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No. 06-1363

IN THE

Supreme Court of the United States

JEFFERSON COUNTY RACING ASSOCIATION, INC.,
dba THE BIRMINGHAM RACE COURSE,

Petitioner,

v.

DAVID BARBER, in His Capacity as District Attorney
of Jefferson County, Alabama,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR GEORGIA COMMITTEE FOR ETHICAL JUDICIAL CAMPAIGNS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Georgia Committee for Ethical Judicial Campaigns is a committee of concerned citizens formed in 2004 in an effort to keep Georgia's judicial elections and courts fair and impartial and to protect the rights of people who come before them.[1] The committee was formed in answer to the call in Justice Kennedy's pivotal concurrence to *Republican Party of Minnesota v White*:

> The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

Republican Party of Minnesota v. White, 536 U.S. 765, 795, 122 S. Ct. 2528, 2545 (2002).

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1. Pursuant to Rule 37.6 this amicus certifies that no counsel for any party authored this brief in whole or in part. No persons or entities other than this amicus, its counsel, or its members made a monetary contribution to the preparation and submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

The formation of a committee independent of the State Bar of Georgia and the Georgia Judicial Qualifications Commission was necessary, because the Eleventh Circuit Court of Appeals has found warrant in the Constitution to protect judicial candidates from "damaging public statement[s] which ha[ve] the imprimatur of the government." *Weaver v. Bonner*, 309 F.3d 1312, 1324 (11th Cir. 2002). The State Bar and the Judicial Qualifications Commission are administrative arms of the Supreme Court of Georgia. O.C.G.A. § 15-19-30; Ga. Const. Article VI, § VII, ¶ VII.

SUMMARY OF ARGUMENT

Relying on newspaper accounts and a pleading filed with a state regulatory body, this brief undertakes to describe the consequences, as they have played out in Georgia, of *Republican Party of Minnesota v. White* and its progeny. In particular, this brief focuses on the contested 2006 race for a seat on the Supreme Court of Georgia. The events detailed in this brief suggest that this Court underestimated the effect of *White* upon the integrity of the judiciary and the rule of law.

Those events also suggest that the tripartite analysis of the concept of impartiality in *White* should be reexamined. That analysis did not anticipate an interest group attempting to buy a seat on a state supreme court. The actions of an interest group in the 2006 Georgia Supreme Court election have been so characterized. That interest group evaluated the justices on the basis of their production of decisions that advanced the group's goal of "restraining the spread of liability." Those evaluations gave no consideration whatsoever for the merits of legal issues.

The holding of *White* is, in effect, that candidates for judicial office have a constitutional right to run campaigns that demonstrate their unfitness for judicial office. The remedy petitioner advocates – recognition of a robust Due Process right to recusal of judges who attained their offices by demonstrating partiality – is an appropriate way to balance litigants' Due Process rights with judicial candidates' First Amendment rights.

ARGUMENT

I. Events in Georgia

A. Legal background

In 2002 this Court held that a "canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment." *Republican Party of Minnesota v. White*, 536 U.S. 765, 788, 122 S. Ct. 2528, 2542 (2002). But this Court "neither assert[ed] nor impl[ied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. 783, 122 S. Ct. 2539.

Later that same year the United States Court of Appeals for the Eleventh Circuit, which encompasses both Georgia and Alabama, went further. It held, "We agree that the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns." *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002). The *Weaver* Court went on to discover – in the penumbra of judicial candidates' free speech right –

a right to protection from rebuttal in the form of "a damaging public statement which has the imprimatur of the government." *Weaver v. Bonner*, 309 F.3d 1312, 1324 (11th Cir. 2002).

B. Political background

Weaver v. Bonner arose out of a 1998 election in which George Weaver, an attorney in private practice, unsuccessfully challenged Georgia Supreme Court Justice Leah Ward Sears. "[H]is ads claimed Sears backed gay marriage. . . . In 2004, G. Grant Brantley backed by [Georgia's Republican Governor Sonny] Perdue, challenged Sears: Sears won in a race in which she raised $396,000 and benefited from a $150,000 ad campaign from the state Democratic Party." Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 4.

In 2005 the Georgia General Assembly passed a sweeping tort reform package. *See* Charles R. Adams III, Georgia Law of Torts § 1-3.1 (2007 ed.). In 2006, recognizing that portions of that bill would be subject to constitutional challenge, certain business interest groups turned their attention to the Georgia Supreme Court. "The president and CEO of the Georgia Chamber of Commerce, George Israel, . . . said that the importance of protecting the 2005 changes to Georgia tort law means the Chamber can't afford to stay out of the races." Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 1.

"[A] collection of interest groups . . . formed an independent committee, a little used format in Georgia that allows for unlimited fundraising and spending as long as certain conditions are met." *Id.* at 4. The group is called "the

Safety and Prosperity Coalition." *Id.* According a newspaper account, the goals of the coalition, "appear[ed] to be identical to the Georgia Chamber's goals." *Id.*

In a letter to a Chamber task force "declaring why the Chamber should get involved in judicial races, Chamber president and CEO Israel included the executive summary of a 2003 'Economic Judicial Report' prepared by the Judicial Evaluation Institute in Washington D.C. and Sequoyah Information Systems in Oklahoma. The JEI is partly funded by the U.S. Chamber of Commerce's Institute for Legal Reform, according to a U.S. Chamber spokesperson." *Id.* at 5.

Acknowledging that the JEI has " 'a point of view,' . . . [t]he 2003 report looked at all seven justices sitting on the Georgia Supreme Court at that time (the same membership today, except that [Justice Harold] Melton has replaced [former Chief Justice Norman] Fletcher)." *Id.* at 4. It considered decisions in certain kinds of civil cases over several years and gave each justice a percentage rating. *Id.* The higher the percentage, " 'the better record the judge has for restraining the spread of liability,' in the estimation of the evaluators." *Id.* Justice Hunstein's score was the lowest, 42%. *Id.* The other justices scored 44%, 47%, 52%, 55%, 56%, and 66%. *Id.*[2] The report was entirely result oriented: it reflected complete indifference to the particulars of the cases or the merits of the arguments. *Id.*

There is evidence that the Chamber and the Safety and Prosperity Coalition recruited J. Michael Wiggins to run against a member of the Supreme Court. Complaint to State Ethics Commission, State of Georgia, *In the Matter of Mike*

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2. The highest score, 66%, was assigned to former Chief Justice Fletcher. Justice Fletcher, who has retired from the Court and returned to private practice, is presently an honorary chair of this amicus.

Wiggins for Georgia Supreme Court, Gary B. Andrews, Complainant, Mike Wiggins *et al.*, Respondents, filed Oct. 18, 2006, pp. 3-6. Mr. Wiggins elected to challenge Presiding Justice Carol Hunstein after considering the possibility of challenging one of the other incumbent justices up for reelection in 2006. *Id.* at pp. 2, 7; Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 1.

C. Candidates and their qualifications

Mr. Wiggins is accomplished. In order to run, he left the number-two legal position at the Department of Homeland Security. Alyson M. Palmer, *Tough race, tougher tactics, How Presiding Justice Carol Hunstein and her campaign advisors adopted what they feared most – the knockout ad*, Daily Rep. (Atlanta), Dec. 20, 2006, at 8. He had clerked for the U.S. Court of Appeals for the Eleventh Circuit. Jill Young Miller and Jeremy Redmon, *Foes in judicial contest go dirty, Caustic attacks fly in debate, TV ads*, Atlanta J. Const., Oct. 31, 2006, at A-4.

But he had little experience directly related to the office he sought. Mr. Wiggins "ha[d] not argued a case before the State Court of Appeals or Supreme Court in his career." Editorial, *Count on Hunstein, State Supreme Court justice's record is solid; voters must see through coalition's move to control seats*, Atlanta J. Const., Oct. 24, 2006, p. A-14. He graduated from the University of Georgia School of Law in 1993, a year after Justice Hunstein was elevated to the Georgia Supreme Court. Jill Young Miller and Jeremy Redmon, *Foes in judicial contest go dirty, Caustic attacks fly in debate, TV ads*, Atlanta J. Const., Oct. 31, 2006, at A-4.

Justice Hunstein was elected to superior court in 1984 and elevated to the Supreme Court in 1992. *Id.* Her "personal story" is, in the words of an editorial writer, "compelling." Editorial, *Reinforce court's integrity by voting for Hunstein*, Marietta Daily J., Oct. 16, 2006. "As a young woman she lost a leg to cancer, and as a young mother was deserted by her husband, but worked her way through college and then law school at Stetson University." *Id.*

D. Contributions

The Hunstein campaign raised $1,066,762. The Wiggins campaign itself raised $276,066. The Safety and Prosperity Coalition raised an additional $1,679,500. So the funds available to support the Wiggins campaign totaled $1,955,556. Andy Peters and Alyson Palmer, *Hunstein win won't end challenges, some say*, Daily Rep. (Atlanta), Nov. 9, 2006, pp. 1, 8.

Funds raised by the Safety and Prosperity Coalition included $50,000 from State Farm Insurance, $100,000 from the Georgia Medical Association, and $50,000 from DaimlerChrysler. Jay Bookman Editorial, *Outsiders invest $1.3 million in Ga. judiciary*, Atlanta J. Const., Nov. 2, 2006 at A-19.

E. Advertisements

According to a political scientist who analyzed the decisions of the Georgia Supreme Court several years earlier, Justice "Hunstein is a law and order conservative with respect to the criminal justice system." Brian Harrell Harbour, The Harbour Report: Politics, Personalities, and Persuasion on the Current Georgia Supreme Court (1998) at 77. Nevertheless, the Hunstein campaign's primary concern going into the race was that she would be attacked as soft on

crime. Those concerns were detailed in a newspaper article published after the election.

> Kenneth S. Canfield, a key campaign adviser who helped Carol W. Hunstein keep her seat on the Supreme Court of Georgia this year, recalled a moment that crystallized what most worried Hunstein and her supporters in her campaign for a third full term.
>
> Canfield was sitting in his law office at Doffermyre Shields Canfield Knowles & Devine watching a television advertisement that had been prepared for the campaign of Brent D. Benjamin, who in 2004 unseated Justice Warren R. McGraw of the West Virginia Supreme Court of Appeals.
>
> With pained gospel tones playing in the background, silhouetted faces of children appear on the screen. A man's voice says, "We won't show you the faces of children, as young as 4, Tony Dean Arbaugh was convicted of sexually molesting. But we can identify the man who ordered him set free to work in a school full of kids he assaulted – Judge Warren McGraw."
>
> Canifeld played the commercial for his firm's office administrator, a woman he said had work with lawyers long enough to know how complex the law and its results can be.
>
> But her reaction was simple. Referring to the incumbent, she said, "That's outrageous that someone like that could be a judge."

> Canfield asked whether there was anything he could tell her that might change her opinion. She said he would have to show her that the ad was a complete lie and the case never happened.
>
> In judicial politics, however, answers are almost never that easy. If attacked as soft on crime in an effective way, said Canfield, a sitting judge can't defend herself.
>
> "It is a very emotionally powerful ad that would be almost impossible for anyone to respond to in a 30-second rebuttal," he said.

Alyson M. Palmer, *Tough race, tougher tactics, How Presiding Justice Carol Hunstein and her campaign advisors adopted what they feared most – the knockout ad*, Daily Rep. (Atlanta), Dec. 20, 2006, at 1, 8.

Those fears were realized. The Safety and Prosperity Coalition aired "commercials claiming Hunstein was a liberal who 'voted to throw out evidence that convicted a cocaine trafficker' and 'ignored extensive case law and over ruled a jury to free a savage rapist.' . . ." *Id.* at 8.

The Hunstein campaign had prepared a counterattack. It ran an ad asserting that Wiggins "was 'sued by his own mother for taking her money'" and that "Wiggins's sister said 'he threatened to kill her while she was eight months pregnant,' and that a judge ordered Wiggins never to have contact with her again." Jill Young Miller, *Justice's TV ad a hard hitter, Wiggins rebuts Hunstein attack*, Atlanta J. Const., Oct. 27, 2006, at D-1. When the ad began running, the Hunstein campaign "distributed to reporters documents to support the ad, including an affidavit by his sister in 1999. . . ." *Id.* The Wiggins campaign "condemn[ed] the ad

as 'the most cruel, false and personal attack aired in Georgia this campaign cycle.'" *Id.*

F. Outcome and future prospects

Hunstein prevailed in a landslide. She won in all 159 of Georgia's counties and got 63.1% of the vote statewide. Andy Peters and Alyson Palmer, *Hunstein win won't end challenges, some say*, Daily Rep. (Atlanta), Nov. 9, 2006, at 1.

But that does not mean there will be no similar challenges in the future. The head of "the American Justice Partnership, the business group that funneled more than $1.3 million to the Safety and Prosperity Coalition" said, "'This is sort of Georgia's first course' of the rough-and-tumble judicial politics seen around the country." Alyson M. Palmer, *Tough race, tougher tactics, how Presiding Justice Carol Hunstein and her campaign advisors adopted what they feared most – the knockout ad*, Daily Rep. (Atlanta), Dec. 20, 2006, at 8.

II. Analysis

Events in Georgia suggest that this Court underestimated the consequences of its decision in *White*. That decision has had a corrosive effect upon the integrity of the judiciary and the rule of law.

The outcome of the Wiggins/Hunstein race is no guarantee of the outcome of future "rough-and-tumble" judicial races. Justice Hunstein's victory is in part a product of the individual strengths and weaknesses of the two candidates. A portion of her strength is derived from the fact that she was a respected and long-serving member of the Georgia Supreme Court. Of course she achieved that status in the pre-*White* era.

Justice Hunstein is a member of a Supreme Court that, by its example and through its authority, leads a state judiciary comprised mostly of men and women who are committed to the ideal of impartiality. Before *White*, fealty to that ideal was an enforceable duty. Now Georgians who are working to preserve the impartiality of the state judiciary, including the members of this amicus, are shoring up a dam against a flood. So far the dam has held. But there is no end in sight to the flood of money from groups advancing particular agendas and the interests of particular classes of litigants, without regard for legal merits. If it continues indefinitely, there is little reason to doubt that the dam will eventually crack and fail.

The holding in *White* that impartiality is not a compelling state interest is founded on a tripartite analysis of the concept of impartiality. The opinion discusses impartiality as "the lack of bias for or against either *party* to the proceeding," as "the lack of preconception in favor of or against a particular *legal view*," and as "what might be described as open-mindedness." 536 U.S. at 775-779, 122 S. Ct. at 2535-2537 (emphasis in the original). The majority opinion acknowledges that bias for or against a party violates Due Process. 536 U.S. at 776, 122 S. Ct. at 2535. But the majority opinion holds that there is no Due Process right to a lack of predisposition as to legal views or to open-mindedness. 536 U.S. 777-779, 122 S. Ct. at 2536-2537.

Events in Georgia since *White* counsel reexamination of that tripartite analysis. That analysis did not fully account for the power and audacity of groups like the Safety and Prosperity Coalition. The sort of partiality the Safety and Prosperity Coalition tried to purchase by financing the Wiggins campaign does not fall neatly into any of the three categories analyzed in *White*: it partakes in some respects of bias as to parties and in some respects of bias as to legal views.

An editorial endorsing Justice Hunstein charged that the Safety and Prosperity Coalition was, "simply put, out to buy a seat on the state's highest court." Editorial, *Count on Hunstein, State Supreme Court justice's record is solid; voters must see through coalition's move to control seats*, Atlanta J. Const., Oct. 24, 2006, p. A-14. That objective was plainly on display in the Judicial Evaluation Institute survey. The survey was unashamedly result oriented. It evaluated the justices of the Supreme Court of Georgia as though they were a sales force, rating them on their production of decisions that advanced the goal of "restraining the spread of liability," with no regard whatsoever for the merits of legal issues. Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 1.

The holding of *White* is, in effect, that candidates for judicial office have a constitutional right to campaign in such a way as to demonstrate their unfitness for judicial office. Recognition of a robust Due Process right to recusal of judges who attained their offices by demonstrating partiality is an appropriate way to balance litigants' Due Process rights with judicial candidates' First Amendment rights.

CONCLUSION

This court should grant certiorari and should recognize a robust Due Process right to recusal of judges who attained their offices by demonstrating partiality.

Respectfully submitted,

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